VEERASINGAM v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Whyatt C.J. (S) and Buhagiar J.) May 17, 1957]

[K. L. — F.M. Criminal Reference No. 2 of 1957]

Criminal Procedure — Appeal — Further grounds of — Discretion of Court to allow to be filed — Criminal Procedure Code (Cap. 6), ss. 307 and 310.

In this case a certificate was given by Smith J. for the consideration by the Court of Appeal of the following points of law: "In a criminal appeal to the High Court from the judgment, sentence or order of a Subordinate Court what are the powers, principles and procedure that govern —

(1) the grant of an extension of time to lodge a Petition of Appeal, and

(2) the permitting of amendments to a Petition of Appeal by the addition of Further Grounds of Appeal or otherwise."

Held: section 310 of the Criminal Procedure Code gives a discretion to the Judge which should be exercised by him in the circumstances of the particular case before him in order that substantial justice may be done.

To exercise his discretion properly the Judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other Judge but if he does he must be careful to look at what that other Judge has done merely as an illustration and not as laying down any judicial precedent.

Dickinson v. Public Prosecutor[1] overruled.

Cases referred to:—

(1) *Dickinson v. Public Prosecutor* (1955) M.L.J. 191.

(2) *R. v. Ng Guan Thong* (1935) M.L.J. 25.

(3) *Jones v. Curling* 13 Q.B.D. 262, 271.

(4) *The Friedeberg* 10 P. 112, 113.

CRIMINAL REFERENCE to the Court of Appeal.

R. Ramani for the appellant.

E. Brown (Federal Counsel) for the respondent.

R. Ramani for the appellant: Petition of Appeal was filed on 3rd November 1956. Further grounds were filed 4 or 5 days before the hearing of the appeal. As objection was taken, I filed Notice of Motion with affidavit, for leave to file additional grounds. I admit that Dickinson's[1] case decides (1) There must be good grounds for delay; (2) The new grounds should be substantial and of merit. But I submit that decision is fallacious. There is no provision of law requiring an appellant to obtain leave before amending the grounds of appeal. But there is provision requiring leave to be obtained for amending a Notice of Appeal. The law is to be found in section 304 and onwards in the Criminal Procedure Code.

Section 310. Judge may permit an appeal on terms — to ensure substantial justice. Originally appellant had to bring a Petition of Appeal (no mention of Notice of Appeal). Then amendment required Notice within 10 days, followed by Petition with grounds of appeal. Petition has to be lodged within 10 days of ground of decision; if not, appeal shall be deemed to have been withdrawn, but this does not limit section 310 which says Judge may permit an appeal on terms in order that substantial justice may be done. Therefore I submit there is no positive prohibition by enactment of any additional point of law or fact in petition.

There is an analogy in civil appeals — leave of the Court is required before additional grounds can be put forward. See also section 20 of Courts Ordinance relating to Criminal Appeals. Notice must be filed within 14 days and Petition of Appeal within 10 days of record being available and no other grounds are considered except by leave of Court. If there is no express prohibition, there must nevertheless be a principle governing additional grounds, otherwise there would be nothing to prevent a new ground being put forward at the hearing and party insisting on it being heard. Bellamy J. went to section 5 of Criminal Procedure Code which led to section 5 of Colony Code and from there to English procedure. The "law in force" means law in force in Colony, not that which is applied in Colony by reference to England. See **Dickinson v. Public Prosecutor**[1].

Rigby's case, 17 Cr. App. R. 111 is a case where the Notice of Appeal was not lodged in time — even there the Court was only concerned with inconvenience. I submit section 310 of Criminal Procedure Code deals only with the law where there is no Notice of Appeal or Petition of Appeal at all. **Ng Guan Thong's case**[2]. This case is irrelevant; it only deals with allowing new evidence.

In U.K. further grounds are permitted without necessity of a motion. **R. v. Shepherd** 17 Cr. App. R. 171; **R. v. Cairns** 20 Cr. App. R. 44; **R. v. Willmott** 24 Cr. App. R. 54. The last case shows that further grounds can be admitted on informal application but Court deprecates the inconvenience.

R. v. Lee Kun (1916) 1 K.B. 337; 32 T.L.R. 225, 226 in which Lord Reading said that if appellant wishes to rely on a ground not mentioned in Notice of Appeal, the Court should be informed as well as Counsel — **Simonds** Vol. 10 at page 525. In so far as Notice of Appeal is to be brought out of time, then good grounds explaining delay and as to merits must be advanced. But where appellant wishes to add to his grounds he may do so, so long as they are substantial and there is no element of surprise. **Sultan v. Emperor** A.I.R. 1920 Lah. 240.

I began by seeking support from U.K.; secondly, if you do not in practice support my view I submit there is inherent jurisdiction to permit amendments — 99A of Courts Ordinance. Third Schedule paragraph 25. Paragraphs 12 and 14 of Second Schedule. These provisions possess inherent jurisdiction to extend time.

E. Brown (Federal Counsel) for the respondent: There have been a large number of grounds of appeal filed out of time. Public Prosecutor has endeavoured to look at these grounds carefully, and he would be the last to object if appellant was asking to take a new ground of appeal which has been overlooked. But this is not a case where Counsel has overlooked a good ground of appeal. There are no fewer than 26 points listed in the additional grounds of appeal.

It is 129 days out of time and appellant was represented by Counsel all the time. It is in circumstances of this particular case that objection has been lodged. Objection will be taken where there is a deliberate wilful and substantial disregard of rules of procedure but not in vast majority of cases — when no such reasons exist.

The first Petition of Appeal is very sketchy. But further grounds of appeal — there are 24 grounds — were filed 18½ weeks out of time. It doesn't make any difference whether this is treated as being an application to file Petition of Appeal out of time or to amend Petition of Appeal out of time. Where any one wishes to file a

Notice of Appeal or Petition of Appeal out of time, or to file an amended Petition of Appeal out of time, or to argue new grounds of appeal not mentioned in Petition of Appeal he must seek permission from the Court and the Court may, in its discretion, permit him to do what he wishes to do. This authority is derived from section 310 or inherent jurisdiction.

Principles on which Court will exercise its discretion are set out in **Dickinson's**[1] case. The problem is essentially the same as in the English Courts, whether the analogy is strict or not. Bellamy J. says the procedure in England is comparable and therefore this Court can derive assistance from English cases. Therefore I refer to English cases to illustrate how English Courts had dealt with this problem. They deal largely with Notice of Appeal but principles are the same. **Henry Williams,** 6 Cr. App. R. 158.

Six months' delay — this could only be excused in very exceptional circumstances. **R. v. Watson** 8 Cr. App. R. 46. Reason for delay was that he had left the matter in the hands of a solicitor — application was dismissed. **R. v. Jackson** 3 Cr. App. R. 166. 2 or 3 days — application granted. **R. v. Villars** 3 Cr. App. R. 246. **R. v. Scheffer** 11 Cr. App. R. 1 "Not to be made a precedent". **R. v. Shepherd,** 17 Cr. App. R. 171. Not desirable to add further grounds — Court has to be firm. Logically less indulgence should be shown in Malaya than in England because rules here are much more favourable to appellant. **R. v. Benjamin** 17 Cr. App. R. 105.

It is not a question whether new grounds proved reasonable prospect of success. **Archbold** page 366. Court has a very wide discretion but I submit this affidavit is inadequate. Appellant took 10 weeks to brief senior counsel. The rest of affidavit explains why Ramani took a further 8 weeks. Here I say there was culpable delay by the appellant. I got the new grounds only 2 days before the hearing. I submit the further grounds are not really just particulars. There are many new grounds of law. Completely fresh consideration has been given to grounds of appeal in place of sketchy ones 18 weeks ago. Court should look at it at wider angle. See **Maxwell** page 208. Appellant was represented by Counsel throughout and delay is very extensive one.

Ramani in reply: I submit first there is a right to add grounds — without proving there is no delay. There has been delay but it is not culpable because all the documents were not on the record. I say the further delay after mid-January was because no date was fixed; if no date was fixed, then there was no hurry.

[At this stage the Court reserved judgment on the question of admission of new grounds but continued to hear the appeal on merits. The arguments advanced on the merits are considered unreportable. **Ed. M.L.J.**]

Cur. Adv. Vult.

Thomson C.J. : — This appeal came before us for rehearing under the provisions of section 34 of the Courts Ordinance. We dismissed it but intimated that we would state our reasons for doing so at a later stage.

Before discussing the facts of the case it will be desirable to set out the course which the proceedings have taken.

On the 5th of October, 1956, the appellant was convicted in the Sessions Court at Kuala Selangor of two offences in contravention of section 3(c) of the Prevention of Corruption Ordinance, 1950, and in respect of each was sentenced to three months' imprisonment, the sentences to run concurrently.

On the same day he gave notice of appeal against these convictions and sentences. On 3rd November, 1956, which was within the statutory period of ten days after being served with the grounds of decision in the case, he filed a Petition of Appeal which set out a number of grounds of appeal to which I shall refer as the old grounds of appeal.

There then occurred a very considerable delay, for which neither the appellant nor his legal advisers were in the slightest measure responsible, in arranging a date for the hearing of the appeal and in the event this was only fixed for 25th January, 1957, and then for 18th March, 1957. In the meantime the appellant's solicitor who had appeared for him at the trial and who had filed his Notice of Appeal and Petition of Appeal retained Senior Counsel and on 12th March, 1957, a document was filed which was entitled "Further Grounds of Appeal" and which set out a great number of grounds of appeal not contained in the original Petition to which I shall refer as the new grounds of appeal.

I pause at this stage to observe that forensically speaking there was no excuse for the delay which in fact attended the filing of the paper setting out the new grounds of appeal. In the past there has been considerable (and deplorable) laxity in this connection, and it is not unfair to suppose that what really happened was that the appellant's advisers thought that so long as Notice was given of these new grounds of appeal a few days before the date fixed for hearing of the appeal no point would be taken as to the delay and the Court would permit the new grounds to be argued.

If that be so, the appellant's advisers were disappointed because when the appeal came on for hearing on 18th March the point was taken by counsel for the Public Prosecutor. After some discussion, the nature of which is not clear from the record, the hearing of the appeal was adjourned to 25th March, 1957, and on 19th March the appellant filed a Notice of Motion "for an Order that the appellant be permitted to urge in support of his appeal" the new grounds of appeal. That Notice was supported by an affidavit, the effect, though not the terms, of which has already been indicated.

The matter came before Smith J., on 25th March when His Lordship heard argument on the appellant's Motion of 19th March and reserved judgment.

On 1st April Smith J., delivered a considered judgment to the effect that he felt himself compelled by the judgment of Bellamy J., in the case of *Dickinson v. Public Prosecutor*[1] to rule that the new grounds of appeal should not be argued. Counsel for the

appellant then said that if he was precluded from arguing the new grounds of appeal he had nothing to say in support of the appeal and it was accordingly dismissed. After some further discussion the learned Judge agreed to give a certificate under section 34(1) of the Courts Ordinance to enable the matter to be taken further and in that certificate which he has now given he has stated that the points of law which it is desirable in the public interest to have determined by this Court are :—

"In a criminal appeal to the High Court from the judgment, sentence or order of a Subordinate Court what are the powers, principles and procedure that govern —

(1) the grant of an extension of time to lodge a Petition of Appeal, and

(2) the permitting of amendments to a Petition of Appeal by the addition of Further Grounds of Appeal or otherwise."

The points of law thus set out by the learned trial Judge clearly go beyond what it was necessary to decide to dispose of the proceedings before him, but as the appeal as a whole now comes before us for rehearing that presents no obstacle to our dealing with it.

It is well settled law that rights of appeal can only be given by statute and that in order to ascertain what these rights are and their extent it is necessary to examine the provisions of the statute which gives them.

The question of rights of appeal in criminal cases from Subordinate Courts is dealt with in section 304 and the succeeding sections of the Criminal Procedure Code. Putting aside the question of appeals against sentences, section 307 of the Code provides that any person dissatisfied with any judgment of a Subordinate Court to which he is a party "may prefer an appeal . . . . . against such judgment . . . . . in respect of any error in law or in fact" within a period of ten days. This is to be done by filing a Notice of Appeal. The Court is then required to serve upon the appellant a signed copy of the grounds of decision in the case and within ten days after service of the grounds of decision (or, if longer, within ten days from being supplied with a copy of the Notes of Evidence if asked for) the appellant must lodge a Petition of Appeal which "shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred." If the Petition of Appeal is not lodged within the prescribed time "the appeal shall be deemed to have been withdrawn."

It will be noticed that an appeal may only be preferred "in respect of any error in law or in fact" and that the Petition of Appeal is to "contain definite particulars of the points of law or fact in regard to which the Court appealed from is alleged to have erred." As a matter of strict construction, and this is a case where the statutory provisions ought to be strictly construed, then if the matter rested on a construction of section 307 this coincidence of language would seem to point to the conclusion that there is no general right of appeal against conviction but that a party can only appeal against conviction in respect of errors in law or in fact which he must specify in his Petition of Appeal and that it is in support of that appeal only that the appellant can be heard under section 313.

Support for this view, if support be necessary, is to be found in the consideration that the hearing of the appeal is not by way of re-hearing and in certain *dicta* of Terrell J., in the Singapore case of *Rex v. Ng Guan Thong*[2]. And, though of course this is in no way conclusive, such an interpretation is by no means inconsistent with the interests of justice. It is just as imperative that a rightful conviction should be successfully defended as it is that a wrongful one should be successfully attacked. And this result would be imperilled if it was possible for the prosecution to come to the trial of a criminal appeal in the dark as to the grounds on which the conviction was going to be attacked.

The matter, however, does not rest there for the rigours of the provisions which have been quoted are mitigated by the provisions of section 310 which reads as follows :—

A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

That section clearly enables indulgence to be shown to an appellant who has not given Notice of Appeal within the prescribed time or who having failed to file his Petition of Appeal within the prescribed time has accordingly been treated as if his appeal had been abandoned. On the construction, however, which has been placed by section 307 it goes a little further. On that construction a party who has not specified a particular error of law or of fact in respect of which the Court *a quo* is said to have erred is debarred from relying on that particular error at the hearing of the appeal and *pro tanto* he is debarred from appealing. In such a case it seems clear that the section empowers a Judge to grant him indulgence on such terms as he may consider desirable "in order that substantial justice may be done in the matter".

Excessive didacticism is a judicial sin which may easily give rise to a great deal of unnecessary litigation. In the present proceedings it is not for us to lay down any rule as to how the powers of the Court under section 310 are to be invoked. The ordinary way of doing so is clearly by notice on Motion though that would always be subject to such directions as the Judge might give in terms of the section. Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed.

The real question with which we are concerned is whether the statement of Bellamy J., in *Dickinson v. Public Prosecutor*[1], *supra*, regarding the principles on which the Court should exercise its discretion in this connection should be approved and whether Smith J., was right in applying these principles in the present case.

The passage in the judgment of Bellamy J., with which we are concerned reads as follows :—

> As to the principles to be applied in considering whether the appellant should be allowed to amend his notice of appeal and/or petition of appeal out of time, I consider that the appellant must satisfy the Court, firstly, that circumstances exist which justify an extension of the time; and, secondly, that he has a reasonable prospect of success on the appeal on the new matters which he is desirous of raising at the hearing of the appeal by the proposed amendment. Each application, must, needless to say, be considered in the light of its own particular circumstances."

It will be noted that the learned Judge lays it down that an appellant who wishes to amend his Petition of Appeal out of time must satisfy each of two conditions, firstly, that circumstances exist which justify an extension of time and secondly that he has a reasonable prospect of success on the appeal on the new matters which he is desirous of raising. Had these conditions been stated in the alternative, and not cumulatively, we might have been prepared to accept the passage quoted as a tolerably accurate piece of inductive reasoning based upon a number of cases in which the English Court of Criminal Appeal has granted or refused similar indulgence to appellants. Where, however, we think the learned Judge was in error was in attempting to lay down any principles whatever, other than those found in the relevant statute, to govern the exercise of a judicial discretion reposed in him. As was said by Bowen L.J., in the case of *Jones v. Curling*[3] :—

> I have always entertained the strongest opinion that the Court would be acting *ultra vires* if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms.

In laying down any such general rule as was pointed out by Brett, M.R., in the case of *The Friedeberg*[4], a Judge is trying to fetter his own discretion and that of his successors which he has no legal power to do.

The only fetter which section 310 places upon the exercise of the discretion which it gives to the Judge is that it shall be exercised "in order that substantial justice may be done." Clearly, to exercise his discretion properly the Judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other Judge but if he does he must be careful to look at what that other Judge has done merely as an illustration and not as laying down any judicial precedent [see the observations of Bowen L.J., in *Jones v. Curling*[3], *supra*].

Here, then, is where Smith J., erred in the present case. He did not apply his mind to the circumstances of the case and then exercise his own discretion. He accepted the rules which had been laid down, by Bellamy J., but which should not have been laid down, for the exercise of that discretion and he exercised it in accordance with them.

[The rest of the judgment deals with the appeal on merits and is not reproduced — *Ed. M.L.J.*].

Appeal dismissed.

Solicitors : *Braddell & Ramani.*